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No. [redacted]85

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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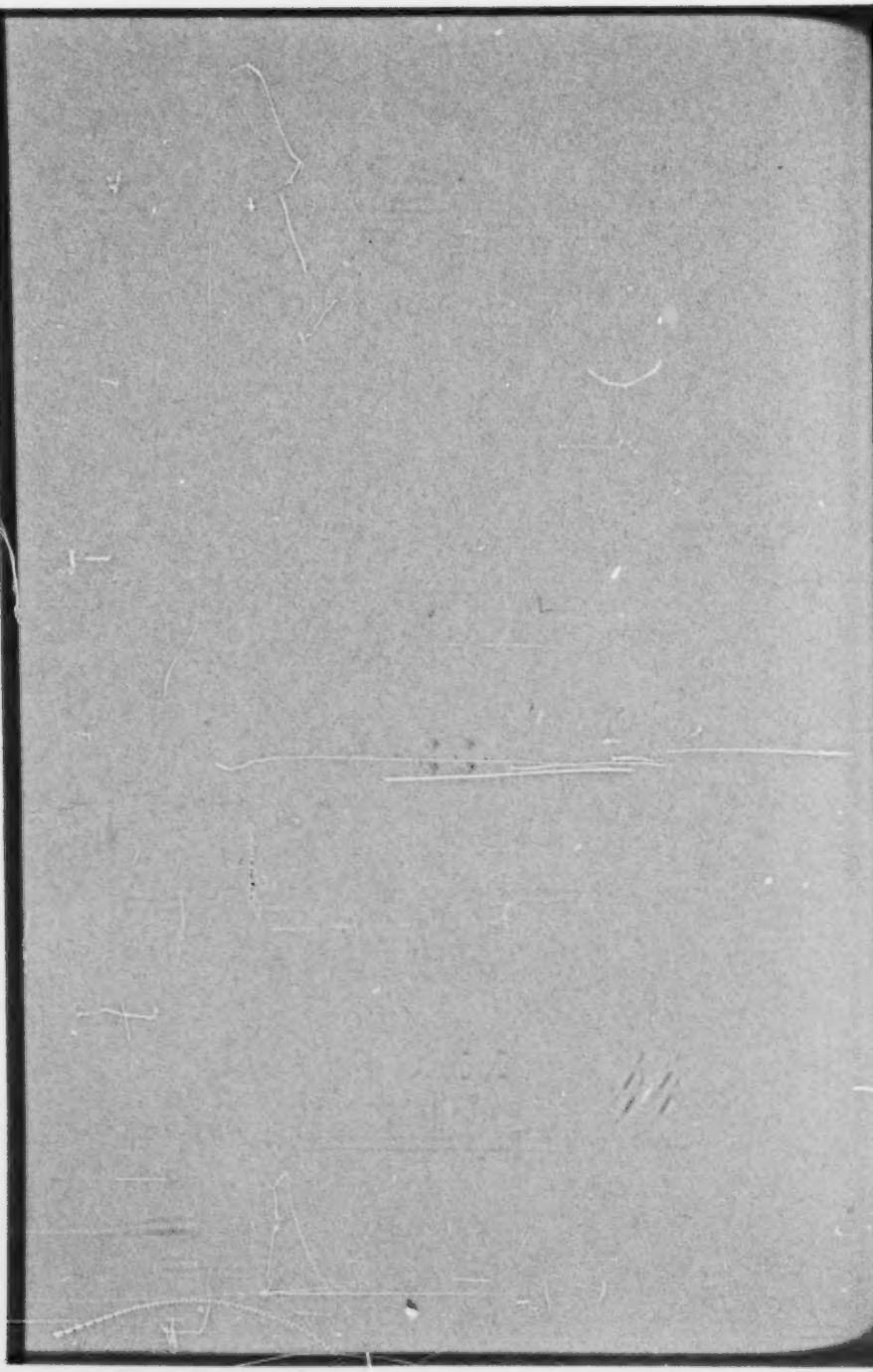

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 804

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The report of Division 3 of the Interstate Commerce Commission (R. 108) is reported at 280 I.C.C. 395. The opinion of the District Court for the District of Oregon (R. 42-75) is reported at 128 F. Supp. 919. The opinion of the Court of Appeals (R. 846-868) is reported at 219 F. 2d 811.

JURISDICTION

The judgment of the Court of Appeals was entered January 10, 1955 (R. 869). Petition for Rehearing was denied March 1, 1955 (R. 870). The petition for a writ of certiorari was filed May 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether, in reversing the District Court, the Court of Appeals erred in holding that the evidence sustained the findings of the Commission that the Southern Pacific had not engaged in any unreasonable or otherwise unlawful practice in furnishing cars to petitioner, and that the carrier had not subjected petitioner to any undue prejudice or discrimination.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in the Appendix to the petition.

STATEMENT

On October 14, 1947, Martin Brothers Box Company filed with the Interstate Commerce Commission a complaint in which it alleged that between January 1, 1947 and September 30, 1947, the Southern Pacific failed in its duty to provide and furnish the petitioner with adequate cars for the transportation of its shipments, consisting of shipping containers (wire-bound boxes), veneer, and lumber, from Oakland, Oreg., to points in other

states, in violation of sections 1 and 3 of the Interstate Commerce Act (R. 77-81).

After hearing, an examiner issued a proposed report in which he recommended that the Commission find that the Southern Pacific had failed in its duty to provide and furnish transportation from petitioner's plant at Oakland, Oreg., upon reasonable request therefor, and that an award of reparations be made (R. 84-106). Following exceptions made to the proposed report, oral argument was heard before Division 3 of the Commission (R. 656-683). Thereafter, Division 3 issued its decision and order in the case finding that petitioner had failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practices, in violation of section 1 of the Act, in furnishing or not furnishing cars to petitioner at its Oakland, Oreg., plant, or that the Southern Pacific had subjected petitioner to any undue prejudice in violation of section 3 (R. 108-127). The petition for reconsideration was denied by the entire Commission (R. 128).

The petitioner on November 27, 1951, filed a suit in the United States District Court for the District of Oregon to enjoin and set aside the order (R. 3-28). The judgment of the District Court annulled, vacated, suspended, and set aside the Commission's order which had denied reparation and remanded the case to the Commission for further proceedings not inconsistent with the Court's opinion, findings and conclusions (R. 74-75). Thereafter, the case was appealed to the

Court of Appeals, Ninth Circuit, which reversed the judgment of the District Court, one judge dissenting, and petitioner has asked that a writ of certiorari issue to review that judgment (R. 846-868).

THE FACTS

Petitioner required and needed a considerable number of cars in excess of those the Southern Pacific was able to furnish for the movement of lumber and wire-bound boxes from Oakland, Oreg., to destinations in other states. Its estimate was 13 cars daily on a 5-day week basis (R. 110, 149-150). During the period covered by the complaint proceedings before the Commission (January 1 to September 30, 1947) there was a critical shortage of cars on the Southern Pacific, as well as on all other railroads of the country (R. 446, 452, 503-504), a fact admitted by petitioner's president (R. 177-178).[1] The shortage on the Portland Division

[1] The Commission found in its report (R. 78, p. 400 of 280 I.C.C.) that:

> After the close of World War II, the Nation as a whole experienced a great industrial development, and during 1947 the Nation's railroads experienced for the first time since 1920, except in the war period, an average daily shortage of cars. During most of the period between World War I and World War II, they had on hand large surpluses of cars, the worst year being 1932 when the average daily surplus amounted to 694,022 cars. During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the Nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.

of the Southern Pacific (on which petitioner's plant was located) was more serious from July to the latter part of October 1947 (R. 555-556). This fact is further admitted by petitioner, at page 3 of its petition.

The car orders of shippers located on the Southern Pacific, including those at points on its Portland Division, were far in excess of the supply available (R. 446, 453, 501-506).[2]

In view of the car shortage situation it was necessary for the railroad to have definite car orders from shippers so as to remove any confusion as to needs and to see that the number and type of car required was placed on the particular day it was needed in order that no car would remain unnecessarily idle at any plant. It was the general practice of the Southern Pacific to furnish cars when specific and definite orders had been placed (R. 565, 610).[3] Petitioner placed both written and oral orders (R. 589), and the railroad requested that it place specific orders for cars (R. 610).

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[2] In order to arrive at a method of equitable distribution of cars among shippers the railroad devised a formula based on the production of mills, capacity to load cars, the supply of cars available for distribution and the number of car orders filed by the mill with the carrier (R. 561-564). The formula was applied after July 1, 1947, to all shippers on the Portland Division, including petitioner. It was not in effect prior thereto because the car shortage was not as severe then as during the latter period (R. 565-566).

[3] During the complaint period the Southern Pacific did not require shippers to place written orders and oral orders were honored when clear and definite. However, such orders were reduced to writing on car order forms by the agent of the Southern Pacific receiving them (R. 589-590).

There was evidence of confusion and conflicting requests on the part of petitioner's agents and officers as to the number of cars needed (R. 609-610).

Petitioner required water-tight box cars for the shipment of its wire-bound boxes and veneer lumber during the complaint period. However, flat and gondola cars were acceptable for lumber shipments (R. 208-209). Over one-half of the cars furnished petitioner were for the transportation of wire-bound boxes (R. 775).[4]

The petitioner was not the only shipper who experienced delays in receiving cars. The railroad received numerous complaints from other shippers during the complaint period (January 1 to September 30, 1947), and from July to October of that year the complaints ran into "thousands" (R. 616).

As heretofore shown it was the general practice of the Southern Pacific to furnish cars to lumber shippers in Oregon only on specific and definite orders. The petitioner and other shippers alike were furnished cars by the Southern Pacific only upon definite and specific orders (Petitioner's Exhibit No. 2, R. 704-759).

After reviewing the evidence on the record as a whole the Commission found and concluded (R. 124-125, Commission's Report, p. 404 of 280 I.C.C.) that:

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[4] The Southern Pacific obviously could not furnish cars properly without knowing the type needed on particular days. It could not rely on general estimates of future need.

The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; and that it is not shown that defendant unduly favored shippers other than complainant.

DECISION OF THE COURT OF APPEALS

The Commission had held that the evidence presented fell far short of supporting an award of reparation as petitioner failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practice, in furnishing or not furnishing cars to petitioner, in violation of section 1 of the Act or that the railroad had subjected petitioner to any undue prejudice or discrimination, in violation of section 3.

In the majority opinion the Court of Appeals pointed out (219 F. 2d 811, 814-815) that the Commission had impartially and at great length summarized the evidence before it and that in no particular can any distortion of the record be found. It called attention to the fact that, in the Commission's summary, evidence is recited in behalf of petitioner which would support a ruling in its favor but there was substantial evidence presented by the railroad pointing in the opposite direction.

The majority opinion, by Circuit Judge Healy, then pointed out (p. 816) that "the shipper's proof of damages was sufficiently specific to have supported an award in some amount had the Commission held in favor of the shipper on the issue of statutory violation."[5] Circuit Judge

[5] The opinion quoted with approval (p. 815) the following conclusion of the Commission made in disposing of petitioner's complaint (R. 125-126):

* * * "Complainant [petitioner herein] alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers, but at the same time requires that they should be equally reasonable in the treatment of their patrons.

(CONTINUED ON PAGE 9)

Chambers, concurred in the results reached by Judge Healy, "on the ground that under the record the Commission was not clearly wrong in finding there was no undue discrimination under the circumstances of the case."

The finding by the majority (p. 813), that the Commission's order is supported by substantial evidence, is clearly correct. This is shown by reference to the evidence of record in the case, which is summarized in the Commission's report and referred to in the majority opinion of the Court of Appeals. The Court correctly stated the scope of judicial review of Commission orders, pointing out that such orders are not to be set aside if they are within the Commission's statutory power and are supported by substantial evidence; and that "To consider the weight of the evidence before the Commission, or the soundness of the reasoning by which its conclusions were reached, is beyond the province of the courts."[6] This finding is supported by numerous decisions of the courts, including *Western Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Virginian Ry. Co.* v. *United*

(CONTINUED FROM PAGE 8)

In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. [Citing authorities.] Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged."

[6] The District Court erred in attempting to weigh and evaluate the evidence (as it did) upon which the Commission's findings are based instead of limiting its review to a determination of whether the findings were supported by substantial evidence.

States, 272 U.S. 658, 663; *Alton Railroad Company* v. *United States,* 315 U.S. 15; *Gray* v. *Powell,* 314 U.S. 402; *Hanna Furnace Corp.* v. *United States,* 53 F. Supp. 341, 344 (aff'd 323 U.S. 667); *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 83.

ARGUMENT

What the petitioner here seeks is a review of the decisions of the Commission and the Court of Appeals for the purpose of sustaining the District Court's action in weighing the evidence, contrary to principles of judicial review of administrative tribunals, and reaching a conclusion different from that arrived at by the Commission and the Court of Appeals.

As we heretofore have pointed out the question presented by the petition is whether the Commission's order is supported by substantial evidence. From a review of the opinion of the District Court it is clear that its judgment was predicated upon an analysis and evaluation of the evidence and only that which was summarized and discussed in the Commission's report. No other record evidence apparently was considered by that Court. We have already shown above that it is the task of the Commission and not the court to weigh and evaluate the evidence.[7]

The Commission had made findings and arrived at conclusions that the evidence presented fell far short of the requirements to support an award of

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[7] The majority opinion of the Court of Appeals refers to this well-established principle of judicial review.

reparation. Also that petitioner had failed to establish that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice, in violation of section 1 of the Act, or had subjected petitioner to any undue prejudice in violation of section 3.

It is respectfully submitted that the Commission's findings and conclusions are supported by substantial evidence on the record as a whole, much of which is discussed in the Commission's report. It must be pointed out that the findings are factual conclusions made after careful review and evaluation of the entire record. They are not made in the sense of factual findings susceptible of demonstration by reference to uncontroverted or specific evidence. The findings represent the judgment of the Commission based upon the facts adduced at the hearings and interpreted in the light of its expert knowledge of the field of transportation. *Johnston Seed Co.* v. *United States*, 191 F. 2d 228, 231.

The most that the District Court could do was merely to determine whether there was any substantial evidence to support the Commission's findings. As we have shown, it went far beyond this. In view of the fact that the question presented here has been before the courts so many times and this Court, as well as other federal courts, has defined the scope of judicial review, which has become standardized in the judicial system, *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15; *Baltimore & Ohio R. Co.* v.

United States, 298 U.S. 349, 358-60; *Western Chemical Co.* v. *United States*, *supra*; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282; *Virginia Stage Lines* v. *United States*, *supra*; *Hanna Furnace Corp.* v. *United States*, *supra*, we insist that petitioner fails to demonstrate that the decision of the Court of Appeals raises questions of any general importance, and that there is conflict with the decision of any other court.

Appellant requests this Court to reexamine the record to determine whether the Court of Appeals is correct. This Court has indicated clearly its attitude toward such requests. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474. In that case the Court spelled out the proper standard of review of administrative orders and then continued at pp. 490-491:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

See also *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409-410.

1. It is claimed by petitioner (Pet. pp. 6-7) that the Commission determined as a fact that during

the time petitioner was being supplied with about 30 per cent of the cars needed by it, other shippers were furnished an average of 80 per cent of their requirements, and, therefore, the Commission's ultimate finding that it had not been shown that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice or to have subjected petitioner to any undue prejudice, was erroneous.

It is submitted that the premise upon which the petitioner's above conclusion is based is entirely false since the evidence shows (as heretofore pointed out) that petitioner was furnished all the cars for which specific and definite orders were placed; also that general and conflicting orders were placed by petitioner (R. 609-610). All specific orders, whether written or oral were honored. The definite and specific oral orders were reduced to writing by the carrier, and petitioner was accorded equal treatment with other shippers, who likewise received no more cars than those for which definite orders had been placed. The practice established by the carrier of requiring definite orders obviously is highly necessary, particularly during times of car shortage.

The Commission found (R. 115) that the evidence presented by a witness (testifying for petitioner) "indicate[s] that cars approximately as ordered were promptly delivered to the complainant from January to June, inclusive, but that from July to September, inclusive, a considerable amount of delay in receiving cars was encountered." It then concluded (R. 124) that the evi-

dence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed;[8] that thereafter in the complaint period more cars were furnished then were requested by written order, though some delays were experienced.

It, therefore, appears instead of petitioner receiving only 30 per cent of the cars for which it had placed definite and specific orders, that it received practically 100 per cent of such cars (R. 748-759). In view of such evidence and other evidence contained in the record as a whole, to some of which we have heretofore referred, it is difficult to see how the Commission could have reached any other conclusion than that petitioner had failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practice in furnishing or in failing to furnish cars to petitioner, in violation of section 1 of the Act, or that the railroad had subjected petitioner to any undue prejudice in violation of section 3.[9]

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[8] The record indicates that this includes orders written by petitioner as well as those definite and specific oral orders placed with the Southern Pacific, later reduced to writing by its agents (R. 589-590).

[9] The question of the reasonableness of requests for car service and the question of discrimination are not questions of law but of fact within the exclusive jurisdiction of the Commission. *Illinois Central R.R. Co.* v. *Interstate Commerce Commission*, 260 U.S. 441, 454; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322; *Virginian Ry Co.* v. *United States*, 272 U.S. 658, 665-666; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304.

2. In regard to the petitioner's claim (Pet. p. 9) that the Commission had denied it any relief on the ground that it had not established the fact of competition with shippers "favored by the carrier", it is submitted that the Commission did not predicate its decision on any such finding. This theory of petitioner's case is based on the statement made in the Commission's report (R. 121) that "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant [Southern Pacific] here assailed."

The Commission's report itself shows that its decision is supported without regard to the question of competitive relationship between petitioner and any other shipper. Judge Pope, in his dissenting opinion, entirely overlooks this fact.

We submit that petitioner's contention that the Commission denied it relief because of its failure to establish the fact that it was in competition with other shippers is fully answered in the majority opinion of the Court of Appeals which states in footnote 7 (R. 853) that:

> An argument is advanced that the Commission misinterpreted the requirements of section 3(1) of the Interstate Commerce Act, in that it is said to have believed there could be no violation of the section unless undue preference was extended to *competitors* of the complaining shipper. The Commission's report and findings afford no basis for the argument.
>
> In this connection it is significant to recall that even the much relied upon report of the

> examiner did not recommend a finding that the carrier had subjected the complainant to undue prejudice in contravention of section 3 of the Act. * * *

It is respectfully submitted that there is substantial evidence in the record as a whole to support the Commission's action in this case. We further submit that no question of general importance is presented and no conflict with the decisions of this Court or any other federal court is shown, including those cited and relied upon by petitioner, which are clearly distinguishable from the factual or legal questions involved herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Associate General Counsel

JULY, 1955.

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Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

Brief of Respondent Southern Pacific Company in Opposition to Petition For Writ of Certiorari

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No. 804

THE MARTIN BROTHERS BOX COMPANY, a corporation,

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vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

Brief of Respondent Southern Pacific Company in Opposition to Petition For Writ of Certiorari

The sole ultimate question presented in the petition for writ of certiorari is whether the findings of fact made by the Interstate Commerce Commission in its report are supported by substantial evidence. We shall show this to be so, and then demonstrate that the Commission's[1] findings of

1. The parties are herein referred to at times as Martin Brothers, the Commission and Southern Pacific. In various quotations Martin Brothers is referred to as Martin or complainant and Southern Pacific as defendant.

fact are supported by substantial evidence and that the decision of the Court of Appeals for the Ninth Circuit is not in conflict with other decisions of this Court or courts of appeals of another circuit.

REPLY TO "QUESTION PRESENTED" AND "STATEMENT OF THE CASE"

We cannot accept petitioner's statement of "Question Presented" or "Statement of the Case" set forth in the petition, and accordingly make our own presentation thereof.

The prior proceedings before the Interstate Commerce Commission and the District Court are stated in the opinion of the Court of Appeals. That statement, which was challenged neither by Judge Pope in his dissenting opinion in the Court of Appeals nor by petitioner in its petition for rehearing in the Court of Appeals, follows:

> "In October of 1947 appellee, hereafter generally called Martin, filed a complaint with the Interstate Commerce Commission alleging that during the period January 1 to September 30, 1947, the Southern Pacific Company failed in its duty to provide and furnish complainant with an adequate supply of box cars for the transportation of its manufactured products from its Oakland, Oregon plant to interstate destinations, in violation of § 1(4) and (11) and § 3(1) of the Interstate Commerce Act, 49 USCA § 1(4) and (11) and § 3(1). The relief asked was that the Commission enter an order commanding Southern Pacific to provide Martin with adequate and equal car service from Oakland, Oregon, to various destinations, and to pay Martin a sum in excess of two million dollars by way of damages. Southern Pacific intervened and in its answer denied the material allegations of the complaint.
>
> The matter was assigned for formal hearings before an examiner for the Commission. Following such hearings the examiner made a proposed report recommend-

ing that the Commission find that Southern Pacific failed in its duty to furnish adequate car service to Martin and that damages be awarded the latter in the amount of approximately $135,000 for such failure.[2] Exceptions to the examiner's report were taken by Martin and Southern Pacific, and after argument Division 3 of the Commission made the report and order here under attack. In its report the Commission, under the heading 'Conclusions,' made, among others, the following ultimate finding: 'We find that complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant, * * * or that [Southern Pacific] subjected complainant to any undue prejudice in violation of section 3.' The complaint was ordered dismissed. Martin petitioned for reconsideration and its petition was denied by the entire Commission by unanimous vote of its membership.

Martin then filed a complaint in the court below naming the Commission and the United States as

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2. A footnote to the opinion here states:

"The finding proposed by the examiner was in response to the claim of violation of the statute requiring rail carriers to furnish cars 'on reasonable request.' No finding was recommended that the railroad had subjected the complainant to undue prejudice in contravention of Section 3 of the Act.

"We may note here that the examiner's recommendations were not binding on the Commission. See Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 285-286, where the Court said: 'Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence.' While this holding had to do with action of the Radio Commission, we have found in the authorities no indication that the same principle is not applicable to holdings of the Interstate Commerce Commission. See Inter-City Transp. Co. v. United States, 89 F. Supp. 441, 445, where the same principle was applied to a decision of the Interstate Commerce Commission, the court citing Nelson Bros. Co., supra."

> defendants. The complaint asked that the Commission's order be set aside as invalid for a variety of reasons. One of these was that the order lacks a rational basis because the findings do not support the Commission's conclusions. Another was that the Commission's findings of fact show that Martin was damaged and is entitled to reparation, and that such findings support no other conclusion. Other reasons assigned were that the Commission misapplied the law and that its action was arbitrary and capricious. The court was asked to enjoin and set aside the order and to remand the case to the Commission with directions to award such damages as the court shall find Martin to be entitled to. * * * On the basis of the record before the Commission the court made findings of fact and conclusions of law to the effect *that the Commission's report and order are not supported by substantial evidence.*[3] Judgment was entered vacating the order and remanding the cause to the Commission with directions to take further action not inconsistent with the court's decision. The matter is before us on appeal from the judgment." (R. 846-848)[4]

The Court of Appeals decision reversed the italicized determination of the District Court "that the Commission's report and order are not supported by substantial evidence". Thus, it necessarily follows that the question presented is whether the Court of Appeals erred in determining that the record made before the Interstate Commerce Commission did contain substantial evidence to support the ultimate findings of fact made by that Commission, viz.:

> "We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as

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3. Italics provided.

4. References in this brief as designated by "R.—" are, like those in the petition, to the record in the Court of Appeals.

> alleged, in violation of section 1 of the act, in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3."

So far as it differs from this statement of the question presented, petitioner's statement at pages 2 and 3 of its petition is in error. The first sentence of that statement is clearly defective so far as it fails to refer to any question as to whether the Commission's findings are supported by substantial evidence. The second sentence of that statement, as well as the third and fourth paragraphs of petitioner's "Statement of the Case", perpetuates petitioner's error, which has run through this case, of considering *car orders* and *shipping capacity* as identical, with a resulting comparison of unlike things as if they were like (developed *infra*). The reference in the second sentence of petitioner's statement to its failure to show "that it was in a competing business with the favored shippers" attempts to bring before this court a consideration which was not relied upon by the Court of Appeals in its decision, and which we do not rely upon in this brief (developed *infra*).

REPLY TO "REASONS FOR GRANTING THE WRIT"

1. The Commission's Decision Is Not Dependent on the Noncompetitive Relationship Between Petitioner and Other Shippers

At the beginning of its statement as to "Reasons for Granting the Writ" (p. 6), petitioner quotes the following from the dissenting opinion of Judge Pope:

> "If this decision stands the railroads can proceed, wholly without hindrance from the Commission, so to pick and choose among shippers that they will, in many instances, be exercising the power to say which industries shall live and which shall die."

This statement is not warranted, because the record shows, as we shall demonstrate *infra*, that petitioner received substantially the same treatment in car distribution and car supply as did other shippers.

The succeeding text of Judge Pope's dissenting opinion rests on the principal premise that the Commission's finding of fact "that complainant has failed to establish * * * that defendant subjected complainant to any undue prejudice in violation of Section 3" was dependent on a lack of competitive relationship between petitioner and other shippers. This is not the fact. As properly stated in footnote 7 to the opinion of the Court of Appeals:

> "An argument is advanced that the Commission misinterpreted the requirements of section 3(1) of the Interstate Commerce Act, in that it is said to have believed there could be no violation of the section unless undue preference was extended to competitors of the complaining shipper. The Commission's report and findings afford no basis for the argument.
>
> In this connection it is significant to recall that even the much relied upon report of the examiner did not recommend a finding that the carrier had subjected the complainant to undue prejudice in contravention of section 3 of the Act. * * *". (R. 853)

We unequivocally state that in this brief we place no reliance on any showing of a lack of competitive relationship between petitioner and other shippers as supporting the Commission decision. We shall demonstrate that the decision of the Commission is fully supported independently of the question of whether it was necessary for petitioner to show that its competitors had been unduly preferred.

2. The Contention That Other Shippers Received 80 Percent of Their Car Requirements Whereas Petitioner Received Only 30 Percent of Its Car Requirements Rests on a Comparison of Unlike Things

The petition contains frequent reference to the contention that other shippers generally were supplied with 80 percent of the cars required by them whereas petitioner received only 30 percent of the cars it required. This comparison as drawn by petitioner is fatally defective, because it does not compare like with like; i.e., petitioner uses the word "requirements" in two entirely different senses: "cars specifically ordered" and "shipping capacity". The 80 percent of the "requirements" of other shippers, referred to as having been furnished, was of the cars specifically ordered by them, as is clearly shown on the face of Exhibit No. 31 before the Commission (R. 797). On the other hand, the 30 percent of petitioner's "requirements" referred to as having been furnished was of petitioner's shipping capacity.

The complete distinction between "cars ordered" and "shipping capacity" (which may provide the basis for a rating to be used in making a reasonable car distribution in a time of general car shortage[5]) is illustrated in the following statement of the Interstate Commerce Commission in *Victor-American Fuel Co. v. Denver & S.L.R.Co.* (1926), 115 I.C.C. 169, 173-174:

> "Obviously the mine's order represents its maximum need on any day. To ignore the order when for less cars than the rating [based on capacity], and use the rating in lieu thereof, as the basis for car distribution, constitutes an unreasonable and wasteful practice. It here resulted in the furnishing to certain mines of more cars than they could use at times when other mines served by the railroad were being deprived of their ratable requirements for cars."

5. No question of propriety of rating is here in issue.

Petitioner's failure to compare like with like not only is defective on its face but is not the type of showing required to establish "an undue prejudice" which petitioner seeks to establish as a matter of law. It was established at an early time that the prejudice prohibited by Section 3 must be "an undue prejudice", and to establish such an undue prejudice like must be compared with like. *Interstate Com. Commn. v. Baltimore & O. R. Co.* (C.C. Ohio, 1890), 43 Fed. 37, 47, affd. 145 U.S. 263.

3. The Record Contains Substantial Evidence to Support the Commission's Findings of Fact

Much of the argument presented by petitioner rests on the premise that the question of whether Southern Pacific Company subjected Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act is a conclusion of law which the courts possess the same latitude to determine as does the Commission. Contrariwise, it has been well settled that this is a determination of fact and the function of the courts on judicial review is to decide whether the record contains substantial evidence to support findings of the Commission which result from that determination. The opinion of the Court of Appeals well summarizes the authorities in its following discussion of this subject:

> "It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate fact. Such approach is erroneous. The courts have repeatedly pointed out that whether given rates or practices are 'reasonable' or 'unduly prejudicial' are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act

involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, p. 665, it was held: 'The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience."' In Nashville Ry. v. Tennessee, 262 U.S. 318, 322, it was said: 'Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case.' And in Swayne & Hoyt v. United States, 300 U.S. 297, 304, the Court said that whether a discrimination in rates or services is undue or unreasonable has always been regarded as peculiarly a question committed to the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. Cf. also Johnston Seed Co. v. United States, CA 10, 191 F.2d 228." (R. 849-850)

Thus, regarding as determinations of fact the Commission's findings that Martin Brothers failed to establish that Southern Pacific during the complaint period "engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the act in furnishing or not furnishing cars to complainant at Oakland, Oreg." or that Southern Pacific subjected Martin Brothers "to any undue prejudice in violation of Section 3," we now show that the record does contain adequate supporting evidence. That evidence falls within three distinct categories, any one of which alone would be "substantial."

A. THE RECORD SHOWS THAT ON THE BASIS OF THE PRACTICE FOLLOWED BY OTHER SHIPPERS AND PETITIONER ITSELF IN ORDERING CARS, PETITIONER RECEIVED TREATMENT IN CAR SERVICE AT LEAST EQUAL TO THAT ACCORDED TO OTHER LUMBER SHIPPERS IN OREGON.

The one common yardstick of record available to compare the car service accorded other shippers generally and that accorded petitioner consists of car orders.

On the basis of cars furnished to cars ordered, both by other shippers and by petitioner, the record shows the comparison to be the following:

Average percentage furnished of all box, gondola and flat cars specifically ordered by shippers of all commodities on Southern Pacific's lines, including the Portland Division 80%
(R. 797)

Percentage furnished of such cars specifically ordered by petitioner 100%
(R. 748-759)

The propriety of using car orders as a common yardstick is attested by the showing of record that it was not, and is not, the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. The record shows that, specifically during the complaint period, the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only if it had received an "order" for the placing of a definite number and type of cars on a particular day. Witness G. M. Leslie, Car Service Agent of Southern Pacific for its Portland Division,[6] testified that cars would be furnished only after car orders had been placed (R. 565); and Martin Brothers, in its own

6. The Portland Division includes practically all the lines of Southern Pacific in Oregon upon which lumber shippers are located.

exhibits, showed that six other Oregon lumber shippers, as well as Martin Brothers itself, received only cars for which they had placed specific car orders (R. 704-759).

During the complaint period there was no requirement that car orders had to be in writing, and it was the practice of shippers to place their specific, day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed car-order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590).

The record further shows that Martin Brothers itself followed the practice of placing specific day-to-day orders, either in writing or orally by telephone, for cars during the complaint period (R. 589). Most of the written orders placed by Martin Brothers were executed on the printed car-order forms by its employee Mr. R. L. Stapleton at the offices of Martin Brothers, *prior to his receiving any information as to what cars might be available*, and then delivered to the agent of Southern Pacific at Oakland (R. 638).

Not only does this conformity by Martin Brothers with the general practice of placing specific orders for cars establish a definite knowledge of Martin Brothers of the car-order practice and an acquiescence by Martin Brothers in that practice, *but the record shows that prior to the complaint period Martin Brothers was expressly admonished to place specific car orders.* Witness F. C. Nelson, Freight Traffic Manager of Southern Pacific at Portland, Oregon, testified that, in an extended conversation respecting the car-supply situation, held at his office in August, 1946, with Mr. R. G. Holland, representing Martin

Brothers, he specifically told Mr. Holland "to be sure to have his people place car orders for the cars" (R. 610). This statement was not denied by Mr. Holland, who appeared as a witness at the hearing (R. 275), and stands uncontradicted.

B. THE RECORD SHOWS THAT MARTIN BROTHERS HELD BOX CARS, AS WELL AS OTHER TYPES OF CARS, FOR THREE OR MORE DAYS AFTER THEY HAD BEEN PLACED ON ITS SPUR TRACK AT OAKLAND.

The record contains uncontradicted evidence that during the complaint period Martin Brothers held many cars of all types for three or more days (excluding Sundays or holidays) after they had been placed on its spur track at Oakland. The extent to which Martin Brothers engaged in this practice is shown in the following table, which summarizes cars so held for loading by Martin Brothers during the 228-day complaint period:[7]

Class of Car	Held 3 Days	Held 4 Days	Held 5 Days	Held 6 Days	Held 7 Days	Held 8 Days	Total
Box	55	25	9	4	2	1	96
Auto	31	27	6	3	—	—	67
Refrigerator	11	4	4	3	—	—	22
Stock	1	2	1	1	—	—	5
Gondola	2	—	1	—	—	—	3
Flat	4	2	1	—	—	—	7
All classes	104	60	22	11	2	1	200

(R. 818-843.)

The holding of 200 cars, as shown by this table, for periods ranging from three to eight days during the 228-day complaint period, during which there was a general car shortage, constitutes substantial evidence to support the Commission's findings. That the Commission considered

7. The days shown include the last day but not the time the car was on hand prior to the first 7:00 a.m., and exclude Sundays and holidays.

this evidence as relevant and gave it weight in reaching its ultimate findings of fact is reflected in the fact that the Commission, after describing this evidence in its report, said:

> "Such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished." (R. 120-121)

Such a holding of cars by petitioner is particularly relevant in comparing the relative treatment received by petitioner and other shippers during a period of general car shortage,[8] when other shippers were in such pressing need of cars. That need is reflected in the following testimony of witness F. C. Nelson:

> "Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?
>
> A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of

---

8. It is undisputed by all parties that the complaint period was a time of general car shortage for which Southern Pacific Company was not legally responsible. The Commission, in its report after reviewing the evidence of record respecting the subject, stated (R. 118):

> "On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

The identical statement was made in the Examiner's proposed report and yet no exception or objection to the statement was ever registered by Martin Brothers, either in its exceptions before the Commission, in its Petition for Reconsideration before the Commission, or in any of the proceedings before the District Court or the Court of Appeals.

complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers." (R. 616)

Judge Pope, in his dissenting opinion, cites with approval the grounds advanced by the District Court in support of its refusal to consider this substantial evidence (R. 867). Those grounds consisted of references to certain factors as indicating to that court the "lack of any probative value of this evidence". Not only did this constitute a definite weighing of evidence by the court, but certain of the factors so referred to contain statements contrary to and unsupported by the evidence of record. For example, the District Court stated:

> "Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than three days, when the daily 7 a.m. track check was made." (R. 72)

But an analysis of the exhibit presenting this showing (R. 818-843) definitely discloses that 104 cars were held by Martin Brothers for three days, excepting Sundays and holidays, following the first 7:00 a.m. after placing, 60 cars were held for four days, 22 cars were held for five days,

11 cars were held for six days, 2 cars were held for seven days, and 1 car was held for eight days. For example, car GN-25173, shown at page 1 of the exhibit under January 8, 1947, was placed some time before 7:00 a.m. of that date but the car was not released by Martin Brothers and did not move out until 7:00 a.m. on January 13, 1947 (R. 818). Thus, the car was actually held six calendar days, but is shown in the table as being held only four days, because the first day is excluded from the figure and one of the intervening days was a Sunday—Sundays and holidays being withheld from all computations of the days cars were held.

The District Court also states that a number of the cars set forth in the above table "were of limited value" to Martin Brothers because of destination restrictions (R. 72). Yet Martin Brothers' president, Mr. F. G. Martin, conceded that no cars loaded by Martin Brothers were ever restricted to any particular destinations. Mr. Martin testified:

> "Examiner Hanson: Did the railroad ever refuse to accept a car that you had billed to a foreign destination?
>
> The Witness: After it was loaded?
>
> Examiner Hanson: When you presented the car and gave them the shipping papers.
>
> The Witness: Not that I know of, not that I can remember." (R. 228)

> "Examiner Hanson: They [Southern Pacific] never required you to ship anywhere?
>
> The Witness: No." (R. 226)

Moreover, although the District Court refers to certain destination limitations as applying to automobile and refrigerator cars, it is apparent from the showing sum-

marized in the above table that less than half of the cars thus held by Martin Brothers for excessive periods were of those two types.

The District Court also states that "Some of the entries in exhibit 42 [R. 818-843] are inconsistent with the defendant's exhibit 40 [R. 804-816]." This is an attempt by the Court to compare unlike situations, because these two exhibits do not purport to constitute the same type of showings; the car statistics of Exhibit No. 42 have their origins in a daily 7:00 a.m. yard check, while the statistics in Exhibit No. 40 were compiled from the original car orders placed with Southern Pacific by Martin Brothers and are not tied down to a 7:00 a.m. time.

The aforesaid statements by the District Court in criticism of Exhibit No. 42, in addition to being contrary to and unsupported by the evidence, reveal by their very content that the Court was attempting to weigh the evidence—a function which it was not the Court's to perform.

C. PETITIONER'S OWN EVIDENCE SHOWS THAT IT CANCELLED CAR ORDERS DURING THE COMPLAINT PERIOD.

Other substantial evidence supporting the Commission's findings is contained in Martin Brothers' own Exhibit No. 8 before the Commission, in which Martin Brothers candidly showed that it cancelled certain of the orders for cars which it had previously placed during the complaint period. That exhibit showed:

Order of Feb. 19, 1947, for 3 cars wanted Feb. 22, 1947, "cancelled"
Order of Feb. 26, 1947, for 2 cars wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Apr. 14, 1947, for 2 cars wanted Apr. 16, 1947, "cancelled for one car"

Order of Apr. 14, 1947, for 1 car wanted Apr. 17, 1947, "cancelled"

Order of June 30, 1947, for 1 car wanted June 30, 1947, "cancelled"

Order of July 2, 1947, for 1 car wanted July 7, 1947, "cancelled"

Order of July 11, 1947, for 1 car wanted July 16, 1947, "cancelled"

(R. 748-759.)

Nor did Martin Brothers' witness Forrest, in presenting Exhibit No. 8, attempt either to qualify or to explain the cancellations shown in his own exhibit.

This is clearly substantial evidence that petitioner during the complaint period was not subjected to any undue prejudice in the distribution of cars.

The only attempt made by petitioner before the Court of Appeals to refute this clear evidence of cancellation of orders was to refer to the testimony of witness F. J. Martin that "If they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through" (R. 344). But that testimony of Mr. Martin concerns alleged *rejection* of cars actually received and does not pertain to the *cancellation* of specific orders for cars which had not yet been received, as shown in Exhibit No. 8. Certainly, if petitioner rejected a car as alleged by Mr. Martin, there would have been no rational reason for it to *cancel* its outstanding order for a needed car.

4. The Decision of the Court of Appeals Is not in Conflict With Any Decisions of This Court or Courts of Other Circuits

Petitioner states (p. 7) that the decision of the Court of Appeals herein "is in direct conflict with" *Florida East Coast Line v. United States* (1914), 234 U.S. 167, 185. In that case, the question before this Court was whether an ultimate

determination by the Commission that certain rates on fruits and vegetables should be reduced had evidentiary support. This Court, on reviewing the record, found that it contained *no evidence* to support the Commission's ultimate determination. The Court said (p. 185):

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide."

There is nothing inconsistent between this holding of the Court and the decision of the Court of Appeals herein. For, as has been shown, the record contains substantial evidence to support the Commission's ultimate determinations herein.

In *United States v. Baltimore & O.R.Co.* (1948), 333 U.S. 169, cited at page 8 of the petition, the Commission in its report had resolved the allegation of a violation of Section 3 of the Interstate Commerce Act by making the ultimate finding that the there assailed conduct of the rail carriers "subjects complainant to undue prejudice and unduly prefers the competing plants above named".[9] The rail carriers, on court review, challenged this (and other adverse determinations of the Commission) as outside the power and authority of the Commission. This Court's decision upheld the Commission's decision and, in doing so, specifically referred to the fact that the Commission had "found" discriminatory conduct to exist. This is the exact converse of

9. *Swift & Co. v. Baltimore & O. R. Co.* (1946), 266 I.C.C. 55, 68.

the present case in which the Commission has "found" that petitioner failed to establish "that the defendant subjected complainant to any undue prejudice in violation of Section 3".

Petitioner states (p. 8) that the opinion of the Court of Appeals herein "is also in conflict with" *United States v. Interstate Com. Commn.* (C.A., D.C., 1952), 198 F.2d 958, cert. den. 344 U.S. 893. In support of this contention petitioner quotes a portion of the Court's following statement in that case (p. 968):

> "We recognize that the Commission's views as to questions of law arising in the course of its duties are entitled to very great weight * * * and in the construction of tariffs there are many practical reasons for according a high degree of finality to its determinations. But there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact', * * *. We are of the view, for the reasons stated, that the present record does not adequately support the Commission's conclusion that the tariffs no longer covered terminal services at the Army Base piers after the Government took over their operation. The determination must therefore be set aside. The question of further proceedings in this regard is discussed in the concluding portion of this opinion."

The context from which this quotation is taken concerns only the propriety of the Commission's interpretation of a tariff provision pursuant to an allegation of a violation of Section 6(7) of the Interstate Commerce Act. Such a question of tariff interpretation has always been held to be one of law which the Court, as well as the Commission, may determine.[10]

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10. *Great Nor. Ry. Co. v. Merchants Elev. Co.* (1922), 259 U.S. 285, 290; *Bernstein Bros. Pipe & Mach. Co. v. Denver & R. G. W. R. Co.* (C.A. 10, 1951), 193 F.2d 441, 444; *United States v. Missouri-Kansas-Texas R. Co.* (C.A. 5, 1952), 194 F.2d 777, 778.

United States v. Interstate Com. Commn., in addition, concerned a judicial review of findings by the Commission respecting alleged violations of Sections 1(5), 1(6) and 2 of the Interstate Commerce Act. The Court's opinion respecting these determinations by the Commission was limited to a discussion of whether they were supported by substantial evidence. Indeed, with respect to the alleged violation of Section 2 (which in its text is somewhat analogous to Section 3) the Court took occasion to indicate this was a fact to be determined in the first instance by the Commission, viz. (p. 973):

> "If the discrimination is to be justified, then, it must be on some basis other than the public-private distinction drawn by the Commission in Weyerhaeuser. *It is not incumbent upon this court to decide in the first instance whether any such basis exists, and we make no ruling on the legality of the discrimination.*" (Italics supplied.)

Therefore, it appears that there is no merit in petitioner's contention that the decision of the Court of Appeals herein is inconsistent with the three cases cited by petitioner. Contrariwise, the holding in each of these three cases fully supports the position of the Court of Appeals that the Court's function of judicial review was limited to determining whether the record contained substantial evidence to support the findings of fact of the Commission respecting the alleged violations of Sections 1(4) and (11) and 3(1) of the Interstate Commerce Act.

CONCLUSION

It is respectfully submitted that the petition should be denied.

San Francisco, California, July 12, 1955.

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CERTIFICATE OF SERVICE

I, CHARLES W. BURKETT, JR., one of counsel for respon
ent Southern Pacific Company, and a member of the B
of the Supreme Court of the United States, hereby certi
that on the 12th day of July, 1955, I served copies of t
foregoing Brief of Respondent Southern Pacific Compa
in Opposition to Petition For Certiorari on the parties
this proceeding, as follows:

1. On petitioner, by mailing copies in duly address
envelopes, with air mail postage prepaid, to its attorne
of record, as follows:

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Portland 4, Oregon.

2. On the Interstate Commerce Commission, by maili
a copy in a duly addressed envelope, with air mail posta
prepaid, to its General Counsel at the offices of the Co
mission, Washington 25, D.C.

3. On the United States, by mailing a copy in a d
addressed envelope, with air mail postage prepaid, to

The Solicitor General,
Department of Justice,
Washington 25, D.C.

CHARLES W. BURKETT, JR

HAROLD B. WILL

No. 85

In the Supreme Court

of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

REPLY BRIEF

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